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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 UNITED STATES OF AMERICA,  
8 Plaintiff,  
9 v.  
10 DONALD S. TOOMER,  
11 Defendant.  
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Case No. 2:17-cr-00193-LRH-CWH

**ORDER**

13 Before the court is defendant Donald Toomer's Motion for Issuance of a Rule 17(c)  
14 Subpoena (ECF No. 72), filed on October 3, 2018. The government filed a response (ECF No.  
15 80) on November 20, 2018. Toomer filed a reply (ECF No. 83) on November 21, 2018.

16 Toomer requests a subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure  
17 directed to the confidential informant ("CI") in this case for production of his notes regarding his  
18 cooperation with the government, including documentation of the CI's communications with the  
19 FBI and of the CI's recording of telephone conversations with Toomer. The government does not  
20 oppose the motion to the extent the subpoena is tailored to cover only the notes relating to the  
21 CI's communications with Toomer. The government argues the remainder of the notes would  
22 have nothing to do with Toomer or his contention that certain telephone conversations were not  
23 recorded, or the recordings were destroyed.

24 Rule 17(c)(1), which governs producing documents and objects, provides that:

25 A subpoena may order the witness to produce any books, papers, documents, data,  
26 or other objects the subpoena designates. The court may direct the witness to  
27 produce the designated items in court before trial or before they are to be offered  
28 in evidence. When the items arrive, the court may permit the parties and their  
attorneys to inspect all or part of them.

1 The moving party bears the burden of showing good cause for the requested pretrial production,  
2 which requires a showing that: (1) the documents are evidentiary and relevant; (2) the documents  
3 are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) the  
4 defendant cannot properly prepare for trial without production in advance of trial and that failure  
5 to obtain the documents may unreasonably delay the trial; and (4) the application is made in good  
6 faith and not intended as a fishing expedition. *United States v. Nixon*, 418 U.S. 683, 699-700  
7 (1974) (citing *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).

8 In *Nixon*, Supreme Court identified “three hurdles” that a moving party must clear in order  
9 to carry his burden: relevancy, admissibility, and specificity. *Id.* at 700. The moving party must  
10 “show the evidentiary nature of the requested materials . . . .” *United States v. Skeddle*, 178  
11 F.R.D. 167, 168 (N.D. Ohio 1996). Conclusory allegations of relevance or admissibility are not  
12 sufficient. *United States v. Sellers*, 275 F.R.D. at 623-24. Documents requested in a Rule 17(c)  
13 subpoena must have more than some potential relevance or evidentiary use, instead, “there must  
14 be a sufficient likelihood that the requested material is relevant to the offenses charged in the  
15 indictment, and the moving party must make a sufficient preliminary showing that the requested  
16 material contains admissible evidence regarding the offenses charged.” *Id.* at 624 (citing *Nixon*,  
17 418 U.S. at 700). The specificity requirement “ensures that the subpoenas are used only to secure  
18 for trial certain documents or sharply defined groups of documents” and to discourage “fishing  
19 expedition[s].” *Id.* (quotations omitted).

20 Here, the CI’s notes regarding his conversations with Toomer are relevant and have an  
21 evidentiary use because the notes may document conversations that were not recorded and are  
22 material to Toomer’s defense. Toomer’s counsel represents that she requested the notes from the  
23 CI’s counsel, who declined to produce the notes absent a court order. Thus, the CI’s notes are not  
24 otherwise procurable before trial by exercise of due diligence, and Toomer requires the notes to  
25 prepare for trial. Regarding specificity, however, Toomer has not demonstrated good cause for  
26 the CI’s production of all his notes regarding his participation with the FBI, some of which may  
27 not even mention Toomer or bear on his defense. Thus, the court will limit the subpoena to the  
28 CI’s notes regarding his communications with Toomer.

1 IT IS THEREFORE ORDERED that Donald Toomer's Motion for Issuance of a Rule  
2 17(c) Subpoena (ECF No. 72) is GRANTED. Toomer must file a proposed subpoena for the  
3 court's consideration that is consistent with this order.

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5 DATED: December 28, 2018

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8 C.W. HOFFMAN, JR.  
9 UNITED STATES MAGISTRATE JUDGE  
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